TRB-88-081-AK
6-3001-2512-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the Reconsideration of the Temporary Authority Issued on June 8, 1988, to Ronald Hyland and Gail Hyland, d/b/a G & R Transportation, 977 Albermarle Street, St. Paul, Minnesota 55117, Authorizing Petitioner to Transport Passengers and Their Baggage Between the Minneapolis-St. Paul International Airport on the One Hand, and on the Other, Hotels and Motels in Ramsey and Washington Counties and South St. Paul, Minnesota.

FINDINGS OF FACT, CONCLUSIONS, RECOMMENDED ORDER AND MEMORANDUM

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on June 30, 1988, in South St. Paul, Minnesota. The parties stipulated to the facts and exhibits, and presented oral argument.
The record closed on June 30.

Appearing on behalf of the moving party for reconsideration, Transportation Management, Inc., was Michael J. Pitton, of the firm of Rohleder & Pitton, Attorneys at Law, 940 Norwest Center, 55 East Fifth Street, St. Paul, Minnesota 5 51 01 -1 71 7 .

Appearing on behalf of the underlying Petitioner, G & R Transportation, was James L. Nelson, Attorney at Law, 161 East Marie Avenue, West St. Paul, Minnesota 55118.

Attending all or a porti on of the proceedings we re Board Chairman Roger A. Laufenburger and Board Members Eldon E. Keehr and Lorraine E. Mayasich.

This Report is a recommendation, not a final decision. The Minnesota Transportation Regulation Board will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Board shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Board . Parties should contact Roger A. Laufenburger, Chairman, Minnesota Transportation Regulation Board, 254 Livestock Exchange Building, 100 Stockyards Road, South St. Paul, Minnesota

55075 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Was the temporary regular route authority which was issued to G & R Transportation properly issued?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. For some substantial time prior to June 3, 1988, G & R Transportation operated an airport limousine service between the Minneapolis-St.Paul Metropolitan Airport and various hotels and motels in Ramsey, Washington and Dakota Counties, all pursuant to a lease with Transportation Management, Inc. The lease arrangement between the two was cancelled on June 3.

2. On June 6, 1988, the Minnesota Department of Transportation's Office of Motor Carrier Safety and Compliance issued an Order of Suspension to Transportation Management, Inc. (hereinafter "TMI"). This Crder recited that TMI's Minnesota motor carrier authority was suspended as of June 8, 1988 due to failure to maintain insurance. The Order provided that a current certificate of insurance, on Form E, must be filed within 45 days of the suspension date or, TMI could request a hearing before the Transportation Regulation Board. The Order also informed TMI that its Minnesota authorities would be cancelled on July 23, 1988 unless a current certificate of insurance were filed. This Order was mailed on June 6, 1988.

3. On June 6, 1988, the Minnesota Department of Transportation issued an Amended Order of Suspension, setting forth exactly the same information as the earlier one, but noting that in addition to four authorities listed in the earlier one, a fifth authority was also suspended and subject to cancellation.

4. On June 6, 1988, G & R Transportation filed a number of applications with the Department of Transportation and the Board. It filed with the Department a petition for regular route common carrier authority for the transportation of passengers and their baggage between the Minneapolis-St. Paul Metropolitan Airport, on the one hand, and on the other, hotels and motels in Ramsey, Washington, and Dakota Counties, from the airport over Minnesota Highway 5 to St. Paul and thence over city streets to hotels and motels in the three counties indicated. Although filed on June 6, this application was actually executed on March 16, and was accompanied by a statement of assets and liabilities dated March 21, 1988. The petition is typewritten, but handwritten across the top of it is the word "Temporary".

5. On June 6, 1988, a copy of the original petition without the word "Temporary" was filed directly with the Board. It was assigned the file number RRCC 738.

6. On June 6, 1988, a third petition was also filed with the Board. It is a petition for temporary charter carrier permit authority for all points in

Minnesota, filed on behalf of G & R Transportation.

7. On June 6, 1988, personnel in the Department's Office of Motor Carrier Safety and Compliance forwarded the petition for temporary regular route authority to the Board, along with an interoffice memorandum stating that:

> We are forwarding the attached petition for futher process-ing by you recognizing that the requirements of Rule

7800.0800 have not been met. This matter was discussed with your staff and upon their recommendation it was determined that MNDOT would not delay this petition.

8. Effective June 7, at 12:01 a.m., National Casualty Company of Southfield, Michigan instituted bodily injury and property damage liability insurance coverage for TMI. Later in that day, National Casualty Company prepared a Form E for filing with the Department. This was mailed to the Department from Michigan on June 7.

9. On June 7, Jeff Johnson, who was a new insurance agent representing TMI, called Sharon Yekaldo, who is a Clerk Typist IV at the Department, and informed her that the insurance coverage was in effect.

10. It is the policy of the Department not to accept oral statements as evidence of insurance -- a written Form E must be filed.

11. On June 8, 1988, the Minnesota Transportation Regulation Board met for its regular weekly meeting. All members were present. During that meeting, there was discussion of the insurance problem of TMI and the pending application for temporary authority filed by G & R. A Department of Transportation employee who was present at the meeting left the meeting room and checked the Department's computer to see if the Form E for TMI had, in fact, been filed with the Department and entered in the Department's records. He returned to the Board's meeting and reported that no such entry in the Department's records had occurred. A motion was made, and carried unanimously, that the Board grant temporary authority (for a period of up to 180 days) for regular route permit authority to G & R Transportation, contingent upon the filing of a petition for permanent authority.

12. TMI had no notice that G & R's petition had been filed or that it was going to be acted on at this June 8 Board meeting. The petition granted authority to G & R which was duplicative of the authority previously exercised by TMI.

13. At the time of the grant (June 8), TMI's authority was suspended. There were no other regular route common carriers authorized to serve the route sought by G & R. There was no other petition on file covering the route. See, Memorandum.

14. After the meeting, a Board employee, Tim Perry, reported the Board's action to another Board employee, Jack Moran. One of Moran's duties is to prepare Orders reflecting Board actions. Moran prepared an ex parte Order granting temporary authority and gave it to a clerical person for typing on June 9. The Order was typed and returned to Moran on June 10, and was executed, date stamped, and mailed to various persons on that date. The service date of the Order is June 10.

15. The Order recites that TMI's certificate was suspended as of June 8, that TMI was the only regular route carrier authorized to serve the routes, that there are no other petitions on file to serve the routes, and that supporting statements have been received. The Order concludes that the public interest requires that the petition be granted.

16. On June 8, the same day that the TRB had met, a telefaxed copy of a Form E evidencing TMI's insurance was delivered to the Department of

Transportation at approximately 4:28 p.m. There was no signature visible on the form. Ms. Yekaldo determined that it was not acceptable. The next day, June 9, Ms. Yekaldo contacted the insurance company, told them that the signature could not be seen, and directed them to send a new one. At noon on June 9, another copy of Form E was telefaxed and delivered to the Department. This copy bore a legible signature.

17. On June 9, the Department's Office of Motor Carrier Safety and Compliance issued a recision of TMI's suspension, indicating that the Order of Suspension mailed on June 8 (sic) was lifted.

18. On June 10, the Department received a "hard copy" of the Form E from National Casualty Company.

19. On June 6, several letters of recommendation for G & R were delivered to the Board. There are 15 such letters, all dated between January 25, 1988 and February 1, 1988. The letters come from various hotels and motels in the St. Paul area. They are general letters of recommendation for G & R. The letters are letters of "character reference" rather than evidence of need. They support G & R, and most of them indicate that they are satisfied with G & R's past performance in providing their patrons with limousine service to the airport. G & R operated under a lease arrangement with TMI. Two subsequent letters were submitted to the Board, one dated June 8 and the other dated June 9, from facilities in South St. Paul. None of these letters, either singly, or together, provide enough detail regarding need to be an adequate substitute for the statement required in Minn. Rule pt. 7800.0800.

20. On June 8, 1988, Jack Moran informed Ron Hyland (of G & R) that the petition for temporary authority had been granted by the Board. Moran told Hyland that before commencing business G & R had to comply with various Board and Department rules relating to tariffs, proof of insurance and cab cards. Hyland filed proof of insurance (on Form E) with the Department on June 9. He obtained cab cards on June 10 (after the issuance of the Board's ex- parte Order). He commenced operations on June 10.

21. G & R and TMI are both operating at this time, providing competing service to various hotels and motels in Ramsey, Dakota and Washington Counties.

22. On June 14, 1988, TMI filed a petition for reconsideration with the Board. The petition asked that the Board's ex parte Order of June 10 granting temporary authority to G & R be vacated and set aside.

23. Oral argument on the petition for reconsideration was had at the Board's regular meeting of June 15. The entire Board, its legal counsel, various staff members, and an individual from the Department's office were present. Attorneys for both TMI and G & R argued the petition. The Board voted, unanimously, to grant reconsideration and refer the matter to the Office of Administrative Hearings with a request for an expedited hearing.

24. The undersigned Administrative Law Judge consulted with the attorneys

regarding dates for the expedited hearing, and on June 16 informed them that the hearing would commence on June 30. On June 17, the Board mailed a Notice of Hearing excerpted from its weekly calendar, noticing the hearing for June 30. The attorneys understood that this was less than 30 days' notice, but neither objected to the hearing date, and both appeared on June 30 and the matter was concluded on that date.

PERTINENT STATUTORY AND RULE EXCERPTS

Minn. Stat. 221.071, subd. 1 (1986), provides, in pertinent part, aS follows:

> The Board may grant a temporary certificate, ex parte, valid for a period not exceeding 180 days, upon a showing that no regular route common carrier or petroleum carrier is then authorized to serve on the route sought, that no other petition is on file with the board covering the route, and that a need for the proposed service exists.

Minn. Rules, part 7800.0800, provides, in relevant part:

> Each application for temporary authority must be accompanied by a supporting statement designed to establish an immediate and urgent need for service which cannot be met by existing carriers. Any shipper's statement accompanying said application must contain a certification of its accuracy and must be signed by the person or his authorized representative having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:
>
> A. description of the specific commodity or commodities to be transported, where the transportation of property is involved;
>
> B. points or areas to, from, or between when such commodities or passengers are to be transported, if service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant to authority requested;
>
> C. volume of traffic involved, frequency of movement, and how transported now and in the past;
>
> D. how soon the service must be provided, and the reasons for such time limit.
>
> E. how long the need for such service will likely continue, and whether the persons supporting the temporary application will support a permanent service application;
>
> F. recital of the consequences if service is not made available;
>
> G. the circumstances which created an immediate and urgent need for the requested service;
>
> H. whether efforts have been made to obtain the service from existing carriers, and the dates and results of such efforts;

1. names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal;

J. name and address of motor carrier who will provide service and is filing application for temporary authority; and

K. if the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor Carrier's number, if known, and state whether such application was granted or denied, and the date of such action, if known.

Minn. Stat. 221.122, subd. 3 (1986), provides in relevant part as follows:

> An order of the board granting a certificate or permit to operate as a motor carrier takes effect on the date of compliance with the requirements of subdivision I . Failure of the person to whom the order was issued to comply with the requirements of subdivision I within 45 days from the service date of the order . . . makes the order null and void upon the expiration of the time for compliance.

Subdivision 1 requires that vehicles be registered with the Department and vehicle registration fees be paid, that evidence of insurance be filed, and that rates and tariffs be filed. These must be done with 45 days from the service date of the order.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Transportation Regulation Board has jurisdiction over the subject matter of this hearing.

2. Proper notice of the hearing was given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge. Since the underlying Order is an ex parte Order, issued without notice to possible Protestants, it is unclear whether or not notice of a reconsideration must be given to possible Protestants. If such notice must be given, it is unclear what the time requirements would be on the giving of such notice. As a matter of law, however, both parties waived any time problems with the notice, and there was no procedural irregularity in the notice of the June 30 proceeding.

3. The application for temporary authority did not contain the

information required by Minn. Rule pt. 7800.0800. The omissions were not mere
harmless errors, nor did the application substantially comply with the rule. Even though the adoption of a rule is a discretionary function, once it is adopted it has the force and effect of law and even the adopting agency does

not have discretion to disregard it. State ex. rel. Independent School Dist.
No. 6, Morrision County v. Johnson,242 Minn. 539, 65 N.W.2d 688 (1954), Springboard vv. Wilson and Company 245 Minn. 489, 73 N.W.2d 433 (1955). See,
Memorandum.

4. The Board improperly granted the temporary certificate because there was no showing that a need for the proposed service existed, as required by Minn. Stat. 221.071, subd. 1 (1986) and because the statement required by Minn. Rule pt. 7800.0800 was not supplied.

5. At the time the Board granted the permit (June 8), there was not a regular route common carrier then authorized to serve on the route sought. Neither was there any other petition on file with the Board covering the route.
Therefore, the Board did comply with two of the three requirements of Minn. Stat. 221.071 (1986). See, Memorandum.

Based upon the foregoing, the Administrative Law Judge makes the following:

RECOMMENDATION

That, upon reconsideration, the Board withdraw its Order granting the temporary authority and substitute, in its place, an Order denying temporary authority.

Dated this 12th day of July, 1988.

ALLAN W. KLEIN
Administrative law Judge

Reported: Tape Recorded.

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve
its final decision upon each party and the Administrative law Judge by first class mail.

MEMORANDUM

There are a number of points that the Administrative Law Judge would like to explain.

I.

Prior to the hearing, the Administrative Law Judge asked each of the attorneys to file a statement of the case, outlining what they thought ought to be included as issues for determination. There was general agreement

between the attorneys for TMI and G & R. The Board's attorney, however, included some issues which differed from the issues raised by the other two. In particular, he proposed an issue relating to an alleged practice of TMI of

obtaining only a certificate of insurance for a single vehicle, rather than an entire fleet. A second issue was that TMI has allegedly been suspended in the past for failure to maintain a Form E on file, and has been cancelled by its insurer on one or more occasions. Thirdly, he suggested that it is necessary for the Board to determine What the standards and practices of motor carrier insurance companies are with respect to their understanding of the scope of their coverage under a Form E.

Neither of the two principal parties was prepared to offer evidence on these issues at the time of the hearing. It also appeared that the Board and the Commissioner both have the authority to investigate such matters on their own motion. Minn. Stat. 221.293 allows either to issue a complaint in the form of an Order to Show Cause. After a hearing on the Order, both have the authority to issue cease and desist Orders, enforceable by district court injunctions or otherwise.

Since the provisions of Minn. Stat. 221.293 are available at any time, the Administrative Law Judge determined that it was best to proceed with the June 30 hearing, and exclude the matters raised by the Board's attorney. This decision is not intended to imply anything about the merits of those issues. It does not prejudice the Board or Commissioner from proceeding under section 221.293 to investigate those issues.

II.

It has been suggested that the Board's el parte Order in legitimate, regardless of whether or not an appropriate supporting statement was filed, because Minn. Rule pt. 1800.8100 acts to waive rules in the event of an emergency such as this.

That rule provides as follows:

> These rules shall not apply to any carrier subject thereto when transporting passengers or property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster.

This rule does not apply to the present situation for a number of reasons. The most obvious one is that the lack of airport limousine service does not rise to the same level as an earthquake, famine, or "other calamitous visitation or disaster".

There are situations, however, when an agency may act contrary to its rules. The general standard is that once a rule has been validly adopted, it has the force and effect of law, and it binds even the agency which adopted it. See cases cited in Conclusion 3 above. The one deviation from this standard occurs in a situation where the particular circumstances are so

unique that enforcing the rule would frustrate the very public policy that the
rule was designed to promote. This occurred in the case of Koronis Manor Nursing_Home_v.._Dept. of Public_Welfare, 311 Minn. 375, 249 N.W.2d 448 (1976). In that case, the Department of Public Welfare had adopted a rule which gave nursing homes the choice of three types of accounting methods to use in allocating certain costs. The Koronis Manor Nursing Home elected one

of the three methods, the one which yielded it the largest amount of reimbursement from the Medicaid Program. Normally, that would be entirely appropriate, but there were some peculiar facts about Koronis' relationship to another facility, which was receiving reimbursement from a different program, which would have resulted in Koronis being doubly reimbursed for the same costs. The Department would not allow Koronis to use the method which Koronis wanted to, and required it to use one of the other methods permitted by the rule. Koronis appealed, and the court ruled that the Department did have the implicit power to impose reasonable standards on Koronis so as to effectuate the Department's purposes, one of which was to properly and efficiently operate the Medicaid Program. The court allowed the Department to ignore its own rule to the extent necessary to avoid an absurd result not contemplated by the rule.

Commentators have expressed the general standard, and this exception, as follows:

> Rules bind not just the public but also the agency itself. An agency is bound by the rules it has promulgated and may not disregard them even though their adoption was discretionary with the agency. The principle that an agency is bound by its own rules is not, however, hard-and-fast. The Minnesota Supreme Court has found that an agency has implicit power to impose reasonable standards to effectuate the purpose of the legislature even though to do so is inconsistent with rules of the agency. Commentators have observed that underlying factors of justice, prejudice to parties, and policy implications of rigid adherence to rules explain the absence of a firm rule. [Footnotes omitted.]

Beck, Bakken & Muck, Minnesota Administrative Procedure, 16.3 (Butterworth's, 1987).

It has also been held that strict and literal compliance with procedural requirements may not be necessary in all cases, so long as a number of tests have been met. For example, the Minnesota Supreme Court has stated as follows:

> Technical defects in compliance which do not reflect bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be protected by the procedures will not suffice to overturn governmental action, particularly where . . . substantial commitments have been made.

City_of Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980).

Neither the Koronis nor the Wurtele "exceptions" are available to the

Board in this case. Ex parte temporary authority is to be granted only sparingly, and only after a satisfactory showing of need. Applicants for temporary authority are allowed to avoid the normal notice and protest requirements, and are allowed to avoid the delay and expense of a hearing prior to obtaining authority. In exchange, however, they are required to supply a specific and detailed supporting statement which is designed, in large part, to be a replacement for the kind of factual record that would be
available to the Board in the more normal setting.

The ex parte process for temporary authority is designed to he quick and blunt, consistent with its being a remedy where there is an "immediate and urgent need". Virtually the only requirement imposed upon applicants is the requirement for the supporting statement described in the rule. Balancing all the pros and cons of this particular situation, it is not inappropriate to require that G & R comply with the rule. Under the circumstances, neither the exception created by Koronis, nor the exception created by Wurtele, are appro-priate to relieve the Board from requiring a showing of need and compliance with the rule.

TMI vigorously contends that the Board violated Minn. Stat. 221.071 for two other reasons, unrelated to need. First of all, it contends that the Board's grant of the temporary certificate was improper because TMI was "then authorized to serve on the route sought". The second is that the Board's grant was improper because if TMI was not then authorized, at least its "petition" was on file with the Board. The Administrative Law Judge does not accept either of these assertions.

The Board's action at its June 8 meeting must be viewed in light of the facts known to the Board at the time that it acted. At that time, the Board had no knowledge of whether TMI would be filing a Form E on June 8, June 9, June 10, or July 8, July 9, July 10, or ever. During the Board's meeting, Gordon Boldt, of the Department, went out of the meeting room and checked the Department's computer to see if Form E had been filed. It had not. He returned to the meeting and reported that fact to the Board. The Board then voted to grant G & R's petition.

TMI argues that since the Order's service date was June 10, and since Minn. Stat. sec. 221.122 provides that no grant of authority is effective until certain requirements relating to insurance, tariffs, and cab cards are met, therefore June 10 is the appropriate date to determine whether or not the

Board's grant was for a route that was already being served by a regular route common carrier. TMI reasons that since its authority was reinstated on June 9, the Board could not allow G & R's authority to become effective on June 10.

Minn. Stat. 221.122, subd. 3 provides that an Order of the Board granting a certificate takes effect on the date of compliance with the requirements of subdivision 1. Those requirements were met on June 10. That is the date that G & R's authority took effect, and that was the date that G & R began operations. But Minn. Stat. 221.071 prohibits the Board from granting a temporary certificate if another carrier is already authorized to serve. There is a difference between "grant" and "take effect". The temporary authority was granted on June 8, and it became effective on June 10. On June 8, there was no other regular route carrier authorized to serve, and so the Board did not violate that requirement when it granted the temporary authority.

TMI also argues that even if it was not authorized to serve on June 8, its suspended authority prohibited the Board from granting G & R's petition because TMI's suspended authority was equivalent to a "petition . . . on file with the Board covering the route" within the meaning of Minn. Stat. 221.071. While it certainly can be argued that the spjrit of the requirement is met if there is a suspended carrier still within the grace period prior to cancellation, that is not what the -letter of the law provides. To adopt TMI's position

would mean that the Board could not grant temporary authority for up to 45 days while a suspended carrier attempted to become reinstated. Such a delay would be a real imposition on the public interest in having carriers authorized to meet legitimate transportation needs. There was no petition on file on June 8, and TMI's suspended authority was not a petition. The Board was within the law to conclude that there was no petition on file on June 8.

IV.

It could be argued that the Board is estopped from reconsidering the authority because G & R has now acted in reliance upon it. The long and short of that argument is that TMI and the Board have both acted very expeditiously in this matter, and G & R has been on notice since at least June 14, when it received a copy of TMI's petition for reconsideration, that its new authority was in question. This is not a case where several years have passed, and large sums of money have been expended in reliance on the Board's Order. Under the circumstances, estoppel is no bar to the action proposed here. Indeed, the purpose of allowing an agency to reconsider its actions is to provide a quick and easy method for an agency to correct errors. Anchor Cas. Co. v. Bongards, 253 Minn. 101, 106, 91 N.W.2d 122, 126 (1958).

On the other hand, if G & R is prepared to go ahead on its petition for permant authority, then the Board may want to consider entertaining domotion for an expedited hearing on that petition. Such a procedure would minimize the financial loss to G & R from the impact of denying its temporary authority .

A.W.K.